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Eolas Technologies Incorporated

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

EOLAS TECHNOLOGIES INCORPORATED,

Plaintiff,

v.

AMAZON.COM, INC.,

Defendant.

CASE NO. 3:17-CV-03022-JST

STATEMENT REGARDING AMAZON.COM INC.'S STATEMENT AND [PROPOSED] ORDER REGARDING NEXT STEPS AFTER COURT'S ORDER RE: PROSECUTION BAR (ECF NO. 387)

Judge: Hon. Jon S. Tigar

Eolas Technologies Inc. ("Eolas") submits this statement in response to Amazon's Statement and [Proposed] Order Regarding Amazon's Motion for Order to Show Cause (Dkt. 393) ("Statement"):

Amazon contends that Eolas filed its proposed order in bad faith, violating the parties' stipulated agreement to extend certain case deadlines. That is completely untrue. Eolas filed its proposed order of necessity and in good faith, with no hint of gamesmanship and no intention of gaining an unfair advantage. The plain truth is that Eolas filed its proposed order reluctantly, and only to comply the Court's Order requiring the parties to file "[a] joint proposed order or competing proposed orders … by September 15, 2017"((Dkt. 387) ("Order"). Eolas could not and would not ignore the Court's deadlines and, as the deadlines had not been extended, Eolas filed its proposed order as required.

Eolas had and has every intention of abiding by the parties' agreed stipulation extending this and other case deadlines, should the Court enter it. Indeed, Eolas' counsel called the Court's Courtroom Deputy Clerk with counsel for Amazon and Walmart on Friday morning to make sure that the Court was aware of the parties' agreed stipulation. It was not until late in the day on Friday that Eolas became concerned that the stipulation might not be entered. At that point, it was far too late to complete the process of negotiating a joint filing, so Eolas prepared the required proposed order just in case it would need to file. Eolas waited as long as it could before filing, in the hope that the deadlines would be extended. At 4:58 PM, Eolas filed its proposed order to comply with the Court's Order. Dkt. 392 (ECF entry showing filing time of 4:58 PM). *See also* Dkt. 377 at 3 ("It is further ORDERED that all deadlines of the Court in the above-captioned cases shall occur by 5:00 P.M. on the day of the deadline unless otherwise ordered."). Eolas believed that Amazon would file a proposed order at about the same time, for the same reason.

Until late Friday, Eolas believed that the parties would continue to meet and confer before filing joint or competing orders. Although that did not happen, for the reason stated above, Eolas' proposed order reflects the substance of the parties' prior discussions, which Eolas undertook in good faith. As Eolas told Defendants during the last meet and confer, it was likely to propose providing any pertinent documents to the Court for *in camera* review, rather than producing them to Amazon, given that any such documents are protected by the attorney-client privilege.

Amazon complains that Eolas hid its intention to seek reconsideration, but Eolas was not hiding anything. As Eolas explained on the meet and confer, Eolas believes that the case should be stayed to resolve the prosecution bar issue. Resolution of the issue includes reconsideration because Eolas believes, for the reasons stated in the motion for reconsideration, that a manifest error of law has occurred that will lead to a substantial injustice. Eolas' proposal to stay the case and its motion for reconsideration are both in furtherance of resolving this issue—which Amazon has argued is case dispositive—prior to the Court and the parties expending resources on other aspects of the case.

DATED: September 16, 2017

Respectfully submitted,

MCKOOL SMITH P.C.

By */s/ Kevin L. Burgess*

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